Petition

81-2204

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,

No.

In the Supreme Court of the United States

CHARLES GOLDFARB and
GOLDFARB BONDING COMPANY and
INTERNATIONAL FIDELITY INSURANCE
COMPANY, and ALLEGHENY MUTUAL
CASUALTY COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

N. C. DEDAY LARENE
Attorney for Petitioners
1500 Buhl Building
Detroit, Michigan 48226
(313) 962-3500

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS
9TH FLOOR, DETROIT, MICHIGAN 48226 — (313) 964-3185

QUESTION PRESENTED

I.

WHETHER A FORFEITURE CAN PROPERLY BE ORDERED AGAINST A SURETY WHO POSTS BOND IN A FEDERAL CRIMINAL CASE WHERE THAT BOND HAS, WITHOUT THE CONSENT OF THE SURETY, BEEN TRANSFERRED FROM ONE INDICTMENT TO ANOTHER, AND THE CRIMINAL DEFENDANT WHOSE APPEARANCE IS THE SUBJECT OF THE BOND HAS PLED GUILTY TO AN OFFENSE CARRYING A MANDATORY TEN YEAR TERM OF IMPRISONMENT, WHERE THAT PLEA WAS ACCOMPANIED BY THE TRIAL COURT'S ASSURANCE OF THE CONTINUATION OF BOND PENDING SENTENCE?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners herein, Charles Goldfarb and the Goldfarb Bonding Agency, the International Fidelity Insurance Company and Allegheny Mutual Casualty Company were sureties for the appearance of one George Casey, who was the principal defendant in a criminal case in the United States District Court for the Eastern District of Michigan. When Casey failed to appear for sentencing, bond forfeiture proceedings were commenced against him and against the Petitioners herein. Petitioners appealed the forfeiture order ultimately entered to the Sixth Circuit Court of Appeals, and that court affirmed the Judgment of Forfeiture which is at issue herein.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	vi
PROVISIONS OF LAW AND REGULATIONS INVOLVED	vi
STATEMENT OF THE CASE	1
REASON FOR GRANTING THE WRIT	6
Where a duly posted appearance bond is, without the consent of the sureties, ordered "transferred" from one indictment to another, and where the criminal defendant whose appearance is guaranteed by that bond is permitted, without notice to the sureties, to plead guilty to an offense carrying a mandatory term of imprisonment of ten years, under a plea agreement which assures the continuation of his bond pending sentence, the sureties must be held to be discharged by operation of law, and a judgment of forfeiture on the bond cannot be properly entered or upheld as against them.	6
CONCLUSION	20

TABLE OF AUTHORITIES

CASE	PAGE
Carlson v. Landon, 342 US 524, 547 (1952)	16
Citizens for Pretrial Justice v. Goldfarb, 88 Mich App 519, 564-567 (1979)	16
Clute v. Ionia Circuit Judge, 131 Mich 203 (1902)	7
Cohen v. United States, 593 F2d 766 (6th Cir. 1979)	15
Gallejos v. United States, 466 F2d 740, 741 (5th Cir. 1972)	15
Geisser v. United States, 513 F2d 862 (5th Cir. 1975)	15
In the Matter of Frank Cannon, 47 Mich 481, 484 (1882)	15
Matthews v. Eldridge, 424 US 319, 333 (1976)	13
People v. Brow, 253 Mich 140, 142-143 (1931)	6, 18
Reliance Insurance Company of Philadelphia v. Colbert, 365 F2d 530, 534 (DC Cir. 1966)	12
Reese v. United States, 76 US 13, 22 (1869)	16, 17
United States v. Cerilli, 558 F2d 697, 701 (3rd Cir. 1977)	8
United States v. D'Anna, 487 F2d 899, 900 (6th Cir. 1973)	6, 7, 18, 19
United States v. Eisner, 329 F2d 410, 412 (6th Cir. 1964); 323 F2d 38, 43 (6th Cir. 1963)	6, 8, 13
United States v. Grady, 544 F2d 598, 602, n. 4 (2d Cir. 1976)	8
United States v. Hesse, 576 F2d 1110 (5th Cir. 1978)	11
United States v. Stricklin, 591 F2d 1112, 1115-1116, n. 1 (5th Cir. 1979)	8

PAGE

United States v. White, 583 F2d 819, 826 (6th Cir. 1978) 14

Ward v. Tinkham, 65 Mich 695, 700 (1887) 6

OTHER AUTHORITIES

MCLA §765.26 ..... 15, 18

Restatement of Security, §128 9

Rule 46(f), Federal Rules of Criminal Procedure 16, 18

Stearns, *The Law of Suretyship*, §6.2 (Elder Ed.) .. 9

OPINION BELOW

Opinion of the Sixth Circuit Court of Appeals affirming the judgment of bond forfeiture is set forth as an appendix hereto.

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming the judgment of bond forfeiture of the trial court was entered on March 1, 1982. This Court's jurisdiction to review the decision of the Court of Appeals by writ of certiorari is invoked under 28 USC §1254(1).

PROVISIONS OF LAW INVOLVED

Proceedings for forefeiture of bond in federal criminal cases are governed by Rule 46(e), Federal Rules of Criminal Procedure. The pertinent portions of that Rule are as follows:

> (1) *Declaration*. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.
>
> * * *
>
> (3) *Enforcement*. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an in-

dependent action. The motion and such notice of the motion as the court proscribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

No. 80-

In the Supreme Court of the United States

CHARLES GOLDFARB and
GOLDFARB BONDING COMPANY and
INTERNATIONAL FIDELITY INSURANCE
COMPANY, and ALLEGHENY MUTUAL
CASUALTY COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners herein were the sureties on a $500,000 appearance bond in a criminal case against one George Casey. When Casey failed to appear for sentencing, the bond was ordered forfeited as against both Casey and Petitioners herein. They appealed that forfeiture as of right to the Sixth Circuit Court of Appeals, which affirmed the forfeiture, and they now seek certiorari to review that affirmance.

On June 13, 1979, George Casey was indicted in case number 79-80359 (hereinafter referred to as "case number

359''), a 31 count indictment. After a number of hearings, bond was ultimately set in this case in the amount of $500,000.

On July 13, 1979, Petitioners posted bond in this matter consisting of $250,000 in United States Treasury Notes (pursuant to 6 USC §15) and $250,000 in conventional corporate surety obligations.

On September 28, 1979, a second indictment, case number 79-80551 (hereinafter referred to as ''case number 551'') was returned against Casey. While similar in many regards, the second indictment was also different in some particulars. For example, both indictments contained a count sounding under 21 USC §848 (the ''Continuing Criminal Enterprise'' statute), but in case number 359, the time frame of the conspiracy charged only extended until June 13, 1979, and in case number 551 the time period charged extended through July 1, 1979. The second indictment also added two charges against Casey. Count 30 of the second indictment charged the defendant Casey with possessing with intent to distribute approximately 116 grams of heroin on or about June 13, 1979, and Count 31 charged him with possession with intent to distribute approximately 92 grams of cocaine on that same date. The Continuing Criminal Enterprise count of the second indictment differed from that found in the first indictment in that the time frame was different (July 1, 1979 as opposed to June 13, 1979) and the statement of predicate acts was broadened, including in case number 551 the two charges of possession with intent to distribute cocaine and heroin on June 13, 1979 referred to next above.

The additional counts in case number 551 stemmed from the discovery of heroin and cocaine on the principal defendant's premises or person at the time of his arrest on the indictment in case number 359.

On or about October 3, 1979, Casey and the Government entered into a Stipulation to transfer the bail theretofore posted in case number 359 to the new indictment, case number 551 "with the same force and effect as if such bail has been posted originally in the case to which transferred." Upon the filing of that Stipulation, which is a preprinted form commonly used in the trial court, a United States Magistrate endorsed his signature upon the Order portion of the preprinted form on which the Government and Casey had indicated their stipulation, and thereby ordered the transfer stipulated to. Although the form contains a place for the endorsement of the consent of the surety, no such signature was affixed on the form in question, and it was represented by the Petitioners by way of affidavit filed in the trial court that they had no knowledge of the superseding indictment or the stipulation to transfer bail, and did not consent to or enter into the stipulation for transfer of bail.

The record of arraignment in case number 551 does not disclose the appearance of any of the Petitioners or representative thereof, much less their consent to the filing of bond in that case.

On June 3, 1980 Casey appeared and entered a plea of guilty in case number 551, pursuant to a Rule 11 agreement which provided in pertinent part that the sentence to be imposed would be "ten years without parole, and the execution of such sentence shall not be suspended, and probation shall not be granted." The agreement further provided that the Government would not oppose "continuation of defendant's bail until the date of sentencing and similarly will not oppose a delay in sentencing until September 1, 1980." The Government further agreed to dismiss the remaining counts against the defendant in case number 551, and all of case number 359 at the time of sentencing. Again, Petitioners had

no notice of the plea or the plea agreement, were not party thereto, and did not appear at the plea proceedings.

At the conclusion of the plea proceedings, the court accepted the guilty plea and the Rule 11 agreement, and entered a judgment of guilty. As the court there recited, "the defendant now stands convicted" of Count 35 of case number 551.

Case was permitted to remain at liberty, and sentencing was ultimately set for September 5, 1980, at nine o'clock in the morning. At nine o'clock, defendant Casey failed to appear, but the court adjourned sentencing for two hours, so as to give him another two hours to appear. At eleven o'clock he again failed to appear. The court then pronounced: "At this time, the Court will declare the bond cancelled and that the U.S. Attorney prepare a bench warrant for Mr. Casey's arrest." The petition for a bench warrant alleging the defendant's failure to appear at 9:00 and 11:00 a.m. was duly filed (in case number 551) in the afternoon of September 5, 1980. Later that afternoon, a complaint and warrant against the principal defendant were filed, charging him with violation of 18 USC §3150 (bond jumping), based upon his failure to appear in case number 551 earlier that day.

A motion for bond forfeiture and for entry of judgment thereon were filed on September 9, 1980, this time bearing both case number.

On September 15, 1980 Petitioners filed their response to the motion for bond forfeiture, setting forth the following arguments in opposition to the propriety of forfeiture:

> 1. Petitioners posted no bond with respect to case number 551, the only case in which the principal defendant is, or could be, in default, and the purported Transfer of Bond to that case does not bind them, since they did not consent to it.

2. The provisions of the accepted Plea Agreement and the Court's Order of June 3, 1980 guaranteeing the continuation of the principal defendant's bond until sentencing was in derogation of Petitioners' right to terminate that bond, and operated to discharge Petitioners.

3. The nature of the Plea Agreement, mandating the principal defendant's incarceration for ten years, so increased the risk of the principal defendant's non-appearance as to discharge the sureties.

Argument on the Government's motion was held the following day, September 16, 1980. At the conclusion of that argument, the District Court granted the Government's motion, and entered judgment of forfeiture against Petitioners under both case numbers.

Petitioners appealed the judgment of forfeiture as of right, and on March 1, 1982, the Sixth Circuit Court of Appeals affirmed the judgment of forfeiture. (The Opinion of the Court is reprinted *infra,* as an appendix to this Petition). On April 17, 1982, George Casey was arrested by United States Marshalls near Cedar Bluff, Alabama. He has since been sentenced in connection with the criminal case out of which the instant litigation arose.

REASON FOR GRANTING THE WRIT

Where a duly posted appearance bond is, without the consent of the sureties, ordered "transferred" from one indictment to another, and where the criminal defendant whose appearance is guaranteed by that bond is permitted, without notice to the sureties, to plead guilty to an offense carrying a mandatory term of imprisonment of ten years, under a plea agreement which assures the continuation of his bond pending sentence, the sureties must be held to be discharged by operation of law, and a judgment of forfeiture on the bond cannot be properly entered or upheld as against them.

As a general proposition of law, bail bonds "are to be strictly construed in favor of the surety and no recovery should be had upon such a bond except upon a clear showing of liability under its express conditions." *United States v. Eisner*, 329 F2d 410, 412 (6th Cir. 1964); 323 F2d 38, 43 (6th Cir. 1963). While there is some variance among the several circuits as to the question, the Sixth Circuit has specifically held that questions of a surety's liability under a federal bail bond are to be interpreted or determined in light of the law of the state in which the bond was made. *United States v. D'Anna*, 487 F2d 899, 900 (6th Cir. 1973). The variance among the circuits as to this question is likely not of decisional significance in the case at bar, since the general propositions of law which govern the resolution of this case are generally shared by both the federal and state decisions.

As a general proposition, and specifically under Michigan law, the liability of a surety is co-extensive with the liability of the principal on a bond, *Ward v. Tinkham*, 65 Mich 695, 700 (1887), but any extension of liability under the general tenor of the recognizance without the consent of the surety does not bind the surety. *People v. Brow*, 253 Mich 140,

142-143 (1931). This is because of the recognition that it would be unfair to allow the principal and obligee to bind the surety to a risk different from or greater than that which he originally contracted to be liable for. See *United States v. D'Anna*, 487 F2d *supra* at 901. This, of course, is a special case of the general proposition that a change in the obligation or duty of the principal discharges the surety.

It has throughout been the position of the Petitioners that since they did not post a bond in case number 551, and did not consent to the purported "transfer of bail" to that case of the bond which they did post, they never became sureties for George Casey's appearance in that case.[1]

Simply put, Petitioners at no time agreed to offer surety in case number 551. The bond filed was filed in case number 359, and applied solely, by its terms to the defendant's appearance in that proceeding — to proceedings in "the above entitled matter," and to no other matter whatever.

---

[1] Indeed, it would have been impossible under Michigan law, for sureties to have entered into a binding recognizance in respect of case number 551 at any time prior to the initiation of proceedings in that case. *Clute v. Ionia Circuit Judge*, 131 Mich 203 (1902). Such a purported recognizance, these cases hold, creates no liability to the surety.

At the time that Petitioners entered into the recognizance which they did (July 13, 1979), case number 551 did not exist. The indictment in case number 551 was not returned until September 28, 1979. In *Clute, supra,* the Michigan Supreme Court held that a recognizance prepared in advance of the arrest and arraignment of the principal defendant, signed and presented by the sureties the day before the arraignment, created no liability as against the sureties, since it was prepared and entered into in advance of the initiation of the prosecution. The bond in the instant case would be subject to the same objection.

The words of the Sixth Circuit itself, in *United States v. Eisner*, *supra*, are perhaps appropriately recalled here:

> Bail bonds, which do not always use the same language, are to be strictly construed in favor of the surety and no recovery should be had upon such a bond except upon a clear showing of liability under its express conditions. 329 F2d *supra* at 412; 323 F2d *supra* at 43.

The "express conditions" of the bond which Petitioners filed bound them as sureties for the appearance of the principal defendant in case number 359, and in no other proceedings.

There was no default in appearance in case number 359. All of the proceedings incident to the plea and sentencing were in case number 551. Indeed, given the fact that Casey stood convicted of one of the counts in case number 551, there could be no default in appearance in case number 359, because the defendant, having been convicted in case number 551, the indictment in number 359, as to him, must be held to have no force and effect.

The Government is certainly at liberty to return a superceding indictment, and it may be outstanding at the same time for the same offense so long as jeopardy has not attached. *United States v. Cerilli*, 558 F2d 697, 701 (3rd Cir. 1977); *United States v. Stricklin*, 591 F2d 1112, 1115-1116 n. 1 (5th Cir. 1979); *United States v. Grady*, 544 F2d 598, 602 n. 4 (2d Cir. 1976). However, in the case at bar, defendant Casey had clearly been put in jeopardy in respect of the superceding indictment — indeed, as the transcript of plea proceedings reflect, he "stands convicted" of Count 35 of that indictment, and the Government is bound to dismiss the rest of the charges against him in case number 551. The Government

having elected to proceed under case number 551, as was its right, it could not proceed under case number 359. When the defendant pled guilty in case number 551, no further proceedings could be had in case number 359 — that indictment has no further possible legal significance or legal life, since to attempt to proceed under it would violate the Double Jeopardy clause. Since no further proceedings could be had in case number 359, other than the dismissal of the indictment, the sureties could have no conceivable future liability under their bond, which was filed to assure appearance in connection with proceedings in that cause only.

It is the most basic tenet of suretyship law that a suretyship obligation is imposed only with the express consent of the promisor, and that therefore he is entitled to stand upon the strict terms of his undertaking — a new contract may not be substituted for the old one without his consent. Stearns, *The Law of Suretyship,* §6.2 (Elder Ed.)

The result contended for here is not merely the result of a peculiarity in the trial court's filing system, or a mere fortuity of the fact that the superceding indictment carried a new number, rather than the same number. As noted above, the indictment in case number 551 added additional charges to the array of counts against the principal defendant, including two substantial possession with intent to deliver charges, apparently arising out of the search of the defendant incident to his arrest in case number 359, and a broadening of the bases for both the conspiracy count and the continuing criminal enterprise charge to which the principal defendant ultimately pled guilty. These additional charges and broadening of charges constitute a material additional to the charges against the principal defendant, and a material broadening of the risk to the surety. Such a material increase in risk discharges a surety by operation of law. Restatement of

Security §128.[2] Thus, even if the superceding indictment had carried the same number as the original indictment, the material variation in the charges would have constituted a sufficient basis to hold that the sureties would have been discharged from their obligation.

The Government's response to this argument in the trial court was to the effect that surety defendants had, or should have had, notice of the second indictment. The trial court appeared to accept these arguments in its granting of the Government's motion, as did the Sixth Circuit. However, the Government's arguments and the courts' conclusions are simply unsupported by the record, and the trial court's summary treatment of the matter denied Petitioners a fair opportunity to litigate the matter.

With respect to notice, both the trial court and the Court of Appeals noted only two facets of record: first, in April of 1980, surety defendants filed a motion to permit them to remove interest coupons from the notes which had previously been posted by them as partial surety in case number 359. It was pointed out by the Government, and relied upon by the trial court and the Court of Appeals that the caption of the Government's response to this motion (which did not object to the prayer of the motion) listed both case numbers, not merely case number 359. However, the Order which was prepared by the surety defendants upon the granting of the motion listed only case number 359. Therefore, although the Government's response offered the potential for notice, the fact that the Order, which was filed after the answer had been filed, and the hearing on the motion had, did not recite case

---

[2] While pretending no great familiarity with the facts of the case against defendant Casey, it is certainly not unreasonable for the writer to infer that the possession with intent to distribute charges arising out of the principal defendant's arrest might well have been the most difficult of all to defend upon.

number 551, suggests most strongly that the surety defendants did not in fact have actual notice. Indeed, an affidavit filed in the trial court, but wholly disregarded by both the trial judge and the Court of Appeals recited that as a matter of fact there was no such actual notice.

The Government and the courts below also relied on the fact that on the morning that the principal defendant was to be sentenced (September 5, 1980), a representative of the sureties was in court, armed with proposed order cancelling bond and returning security. This, it was concluded, suggested actual knowledge of the continuing proceedings. However, the order which was to be presented recites only case number 359, and not case number 551, so that no matter what notice Petitioners may have had of the fact that a proceeding was scheduled in regard to George Casey, the fact of their presence and preparation of an order cancelling bond does not in any way suggest that there was actual notice of the nature of the proceedings — the fact that a superseding indictment had been returned, which broadened the charges against the principal defendant, and increased thereby the risk to the sureties. Indeed, the fact that the order, prepared for submission September 5, 1980, only recited case number 359 suggests strongly that they had no such knowledge.

The opinion below cannot be supported by any finding of actual notice to or knowledge by surety defendants, both because the record is barren of any facts showing such notice or knowledge, and because, given the denial to surety defendants of the opportunity to present evidence on the issue, such a finding would be improper. Yet in the only case upon which those opinions rely, *United States v. Hesse*, 576 F2d 1110 (5th Cir. 1978), it is clear that the surety company had actual notice of the superceding indictment, and the principal defendant's arraignment thereon. 576 F2d *supra* at 1113.

The burden with respect to acquiring knowledge of modifications in the relationship between obligee and principal cannot logically be laid at the doorstep of the surety — to do so misapprehends the basic nature of the suretyship relationship. Thus, in holding that the modification of payment schedule operated to discharge the surety in a construction contract, the court in *Reliance Insurance Company of Philadelphia v. Colbert*, 365 F2d 530, 534 (DC Cir. 1966) wrote:

> A surety company is not a public utility. It may, for any or no reason, conclude not to furnish its bond with respect to a particular contract. When it has committed itself with respect to one contract, amendments which convert that agreement into a significantly different one should be brought to the attention of the surety so that it may exercise its own business judgment as to whether it wishes to continue its commitment. It is not for the parties to the contract to decide among themselves that their amendments are of no interest to the surety, at least when, as here, those amendments go beyond mere matters of form.

While consent may certainly take the form of acquiescence, there can be no question of acquiescence where there is no finding of actual knowledge — a finding which is precluded by the record below, as well as by the fact that the surety defendants were precluded from going forward with proof of lack of such knowledge or notice.

Repeatedly, at the September 16, 1980 hearing, counsel for surety defendants argued for an opportunity to present testimony if factual determinations were to be critical to the trial court's conclusions. Although the trial court's decision obviously hinged upon factual matters, surety defendants were not permitted the evidentiary hearing which they sought.

This, of course, constituted error on the part of the trial court, but beyond this suggests that the trial court's conclusions, insofar as they turn on factual matters, are "clearly erroneous," because unsupported by an appropriate testimonial basis. Beyond this, of course, the court's treatment of the matter was at odds with the very essence of the due process clause — the "fundamental requirement" of which is the right to be heard. *Matthews v. Eldridge*, 424 US 319, 333 (1976), and the Court of Appeals' reliance on its factual determinations and affirmance of its conclusions subject to the same infirmity.

The functional result of the lower courts' treatment of this issue was to forge, *sub silentio,* a requirement that a surety investigate at its peril the continuity of the relationship between its principal and the obligee. There is simply no mandate or justification in law or logic for such a holding, and such a rule would fly in the face of the most basic principles of suretyship law, as well as this treatment of the suretyship relationship. The words of the Sixth Circuit itself in *United States v. Eisner, supra* might well be recalled. It is hardly consistent with the requirement that "a clear showing of liability under" the "express conditions" of a bond, "strictly construed in favor of the surety" must be made, to hold, as the district court apparently would, that a surety may be held liable in a different case, containing additional and different charges, and that the terms of a bond applying to a specific case, undismissed, uncancelled and unexonerated, may be held to apply to another case, on some theory that the surety could (or even "should") have known that the defendant Casey and the Government unilaterally elected to "transfer" that bond, and to alter the nature of the sureties' risk, both by that transfer, and by the subsequently executed plea agreement.

It was a portion of the Rule 11 agreement, ultimately accepted by the trial court, that the Government would not

oppose the continuation of the principal defendant's bond until sentencing, and that sentencing would not be had until September 1, 1980. The court, it will be further recalled, accepted that plea agreement at the close of the proceedings, and, pursuant thereto, continued the defendant's bond pending sentencing, which was ultimately not scheduled until September 5, 1980.

It is clear enough that the continuation of the principal defendant's bond was a factor which motivated the plea, and was one of the elements of consideration in return for which the defendant offered to plead, and did plead guilty. While the language of the plea agreement was to the effect that the Government would "not oppose" the bond continuation, the realistic view of the matter is that it was the continuation of the bond, rather than the Government's lack of opposition, which was the consideration, and, had the court not seen fit to continue the defendant's bond, it could not have said to have accepted the Rule 11 agreement — indeed, if at the close of the proceedings the court had felt that it could not continue the defendant's bond, it seems clear enough that the defendant would have been entitled to withdraw his plea.

The courts have taken a realistic view of such matters. Thus, in *United States v. White,* 583 F2d 819, 826 (6th Cir. 1978), the court rejected the argument that "once the Government has recommended a sentence to the court, *or not opposed the defendant's sentencing request,*" in Rule 11 agreements involving a Government promise to make a recommendation, or not to oppose a request, (emphasis supplied) the defendant is bound by his guilty plea. Rather, the court held that under such circumstances, if the trial court did not feel that it could accept the Government's recommendation, or the unopposed request, it would not be living within the Rule 11 agreement. In such a case, the court would have the option, prior to accepting the plea, of indicating its declination to accept the Rule 11

agreement, However, once it accepted the plea, and the Rule 11 agreement, it would be bound to abide by the recommendation, or request which the government agreed not to oppose.

In the case at bar, the unopposed request for bond continuation was as surety a part of the Rule 11 agreement as a sentencing recommendation or unopposed request. Once the trial court accepted the plea and accepted the Rule 11 agreement, it was bound to abide by its provisions. While, in the first instance, it could have permitted the defendant to withdraw his plea, once the plea was accepted, and the Rule 11 agreement with it, the principal defendant would have been clearly entitled, at a minimum, to specific performance of the provisions of the agreement — including the continuation of his bond through sentencing, which would not, in any event, have occurred before September 1, 1980. *Gallejos v. United States,* 466 F2d 740, 741 (5th Cir. 1972); *Geisser v. United States,* 513 F2d 862 (5th Cir. 1975); see also, *Cohen v. United States,* 593 F2d 766 (6th Cir. 1979).

The effect of this state of affairs — unconsented to and unknown by the Petitioners — was to deprive the sureties of a significant right and power incident to their relationship to the principal defendant, and, thereby, to effect a discharge of their obligation as a matter of law.

Under MCLA 765.26, a surety for a defendant in a criminal case has the right at all times to be relieved from his responsibility to the court, simply because he may "desire" to be so relieved; if the surety shall so desire, he may, under the statute, arrest the accused and delivery him up to custody. In making such an arrest he is entitled to the assistance of local law enforcement personnel. This statute reflects the common law of Michigan, which clearly holds that a defendant's sureties are "in law entitled to his custody, and could at any time [hand] him over to the authorities." *In the Matter of Frank*

Cannon, 47 Mich 481, 484 (1882). The right of the surety to take the defendant into custody and be relieved from their obligations on the bond, under the provisions of the statute, has recently been upheld by the Michigan Court of Appeals in *Citizens for Pretrial Justice v. Goldfarb,* 88 Mich App 519, 564-567 (1979). Indeed, it reflects the federal common law. As this Court wrote in *Carlson v. Landon,* 342 US 524, 547 (1952):

> When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers. While *the bailsmen may arrest without warrant*, the court proceeds under bench warrant to retake the prisoner. (Footnote omitted; emphasis supplied).

However, after June 3, 1980 and the acceptance of the Rule 11 agreement and guilty plea by the trial court, sureties no longer could have exonerated their bond by delivering the defendant into custody, as Michigan statute and case law, or Rule 46(f) Federal Rules of Criminal Procedure, would ordinarily allow — this is so because the specific terms of the plea agreement and the court's acceptance of it, as well as the court's direction at the close of the plea proceedings guaranteed the defendant that his bond would be continued at least until September 1, 1980, in derogation of sureties' rights to maintain the security of their own undertaking by taking the defendant into custody and thus ending his release upon bond.

Nothing could be clearer than that this action by the Government and the trial court manifestly altered the nature of the risk to the sureties, and must therefore be held to have discharged the surety defendants from any obligation on any bond. As this Court wrote in *Reese v. United States,* 76 US 13, 22 (1869):

> There is also an implied covenant on the part of the government, when the recognizance of bail is ac-

> cepted, that it will not in any way interfere with this covenant between them, or impair its obligation or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.

In *Reese,* the Court held that a surety was discharged by operation of law when the Government agreed that the principal defendant might depart the United States — because in permitting the departure of the principal defendant, the Government impaired the ability of the sureties "to exercise their right to arrest and surrender him." *Ibid.* Since "this was all done without the concurrence or even knowledge of the sureties, whose risks were thus greatly increased," (*Ibid.*), the court wrote: "It would be against all principal and all justice to allow the government to recover against the sureties for not producing their principal." (*Ibid.*)

The trial judge turned this argument aside, stating only that the surety defendants would have had the right to have delivered the defendant up and exonerated their bond. However, had surety defendants attempted to do so, they would have collided head-on with the provisions of the trial court's order which in effect guaranteed the defendant his freedom on bond up until the time of sentencing. Armed with his right to specific performance of his accepted plea agreement, defendant Casey could (and obviously would) have enjoined the proposed surrender (and exoneration), since the continuation of his bond — and his freedom — until the time of sentencing were guaranteed by the trial judge's acceptance of his plea. And does it seem likely that faced with such a challenge, the trial judge would have permitted her order continuing the defendant on bond prospectively to have been impaired, or its authority threatened, by sureties' proposed exoneration?

However, this alteration of the sureties' risk was not the only one effected by the plea-taking.

When the principal defendant's plea of guilty was accepted on June 3, 1980, pursuant to the plea agreement, his "hopes for freedom by vindication" were no greater than those of the principal defendant in *D'Anna*. Like *D'Anna*, he had plead guilty, and so could look forward to significant possibility of relief from an appellate court. Unlike *D'Anna*, he had not been sentenced, but, since the court had accepted the plea agreement, it was committed to impose a sentence of ten years — ten times that which was imposed on the principal defendant in *D'Anna*.

In effect, the principal defendant in the instant case was as good as sentenced — and sentenced, one might observe, to a period of time which for a 61 year old man might possibly have amount to the rest of his life. Petitioners were not advised of the plea proceedings, or of the plea agreement, although the taking of the plea so changed the risk of non-appearance by the principal defendant that Petitioners, had they been advised, might well have been expected to have exercised their rights under MCLA 765.26 and Rule 46(f), Federal Rules of Criminal Procedure, and exonerated their bond by surrendering the defendant. Alternatively, Petitioners, feeling insecure, might well have asked for further collateral which would have not only operated to vindicate their interests, but also to insure the appearance of the principal defendant.

In *United States v. D'Anna, supra*, the Sixth Circuit set aside a bond forfeiture ordered by the District Court where the District Court judge, without the knowledge or consent of the surety, ordered the principal defendant's bond continued after sentence, with the direction that the principal defendant surrender himself to begin serving that sentence approximately one week thereafter.

The court referred to *People v. Brow, supra,* and following Michigan law, held that "sentencing is the final disposition of an insured's case which terminates the surety's legal obliga-

tions." 487 F2d *supra* at 901. The rationale for that holding was well stated by the court:

> Once sentence has been pronounced the principal's hopes for freedom by vindication are considerably reduced. For this reason the risk of flight is substantially increased, a risk clearly not contemplated at the time of the execution of the instant bond. (*Ibid.*)

While the factual situations presented by the case at bar and *D'Anna, supra*, are not precisely analogous, the reasoning of the *D'Anna* court is suggestive.

The Court of Appeals, in turning aside this latter argument, noted that the Appearance Bond to which Petitioners were parties guaranteed the appearance of the defendant Casey not only through sentencing, but through appeal. However, that recognizance was made and filed only in connection with the charges originally laid against the defendant Casey — not the charges as broadened by the subsequent indictment, or as solidified by the defendant's plea of guilty.

CONCLUSION

The decisions below not only represent a fundamental injustice to the Petitioners, but a substantial expansion of the bases upon which a surety may be held liable for a criminal defendant's default in appearance. Because of the palpable unfairness to Petitioners, and because the decisions below bespeak the need for guidance by this Court, this Court should grant the writ of certiorari herein prayed for, and vacate the bond forfeiture ordered by the courts below.

Respectfully submitted,

/s/ N.C. DEDAY LaRENE

N.C. Deday LaRene
Attorney for Petitioners
1500 Buhl Building
Detroit, Michigan 48226
(313) 962-3500

Appendix

No. 80-1658

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE CASEY,
Defendant,

CHARLES GOLDFARB and GOLDFARB BONDING COMPANY and INTERNATIONAL FIDELITY INSURANCE COMPANY, ALLEGHENY MUTUAL CASUALTY COMPANY,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 1, 1982.

Before: EDWARDS, Chief Judge; MARTIN, Circuit Judge; and REED,* District Judge.

MARTIN, Circuit Judge. Surety defendants Charles Goldfarb, Goldfarb Bonding Company, International Fidelity Insurance Company, and Allegheny Mutual Casualty Company appeal an appearance bond forfeiture.

On June 13, 1979, the principal defendant George Casey was indicted in the Eastern District of Michigan for various

* Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

narcotics violations. This indictment, referred to by the parties as "#359", included a count of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848.

Casey's bond was set at $500,000. On July 13, 1979, the District Court held a "*Nebbia*" hearing pursuant to the government's motion to examine the corporate sureties. *See United States* v. *Nebbia*, 357 F.2d 303 (2nd Cir. 1966). At this hearing, Casey's counsel alerted the court that Casey might be facing additional narcotics charges because of drugs allegedly found in his possession at the time of his arrest under the original indictment. Counsel then asked for assurances that the $500,000 bond would cover any such additional charges. The court's response, although not unequivocal, indicated agreement. Charles Goldfarb and his attorney were present at the *Nebbia* hearing; neither objected to defense counsel's request.

On September 28, 1979, a superceding indictment, #551, issued against George Casey. It differed from #359 only in that it included the anticipated additional two charges of "possession with intent to sell' and extended the time frame of the § 848 violation by about two weeks.

On October 3, 1979, Casey, accompanied by his counsel and the prosecuting attorney, was arraigned on the superceding indictment. Bail was continued in the amount of $500,000. The presiding magistrate entered a stipulation and order to transfer bail to indictment #551. The surety defendants were not represented at this hearing.

Between October 2, 1979 and June 3, 1980, all documents filed by the government in this case bore the numbers of both indictments.

On April 9, 1980, the surety defendants filed a Motion for Permission to Remove Interest Coupons from Notes Deposited as Security for Appearance under Case No. 359. The government's answer contained references to both #359 and #551.

On June 3, 1980, Casey pleaded guilty to the "continuing criminal enterprise" count of the superceding indictment. According to his plea bargain, he would receive a sentence of

ten years without possibility of parole. The government agreed to dismiss the entire original indictment and all remaining counts of the superceding indictment at the time the court imposed sentence on the plea.

Casey failed to appear for sentencing on the scheduled date. The surety defendants did appear, however, prepared to seek release from their bond obligation. The court issued a bench warrant for Casey's arrest and the government moved for forfeiture of his appearance bond. After a hearing on September 9, 1980, the court entered a judgment of bond forfeiture. The surety defendants appeal.

Before addressing the merits of this appeal, we note that the correct standard of review in bail bond forfeiture cases is whether the District Court's actions were "arbitrary and capricious." *United States* v. *Parr*, 594 F.2d 440 (5th Cir. 1979).

The surety defendants argue that the bond they posted on behalf of George Casey applied only to the original indictment. In support of this position, they advance several theories.

First, they argue, the language of the bond contract itself precluded its application to the superceding indictment. They direct our attention to an earlier decision of this court, *United States* v. *Eisner*, 329 F.2d 410 (6th Cir. 1964), where we held that bail bonds should be construed strictly and that recovery on a bond depends on a showing of liability under its express conditions. *Id.* at 412.

The surety defendants' reliance on *Eisner*, however, fails to strengthen their position in this case. Nothing in the language of this bond prohibited transfer of its provisions to a superceding indictment which alleged substantially the same offenses as the first. Indeed, the sureties undertook to guarantee Casey's appearance at "such other places as the defendant may be required to appear, *in accordance with any and all orders and directions relating to the defendant's appearance in the above-entitled matter* as may be given or issued by the

magistrate or by the United States District Court." (emphasis added.) Thus, the sureties' assertion that the order transferring bail to the superceding indictment was ineffective is simply without merit.

Second, the sureties contend that the superceding indictment differed materially from the first in that it contained additional counts against Casey. According to this argument, the two additional counts of "possession with intent to sell" increased the sureties' risk of Casey's non-appearance and therefore operated as a release of their obligation under the bond. We do not dispute the general principle that a material increase in risk discharges a surety; we do, however, reject the suggestion that it applies to the present case. We do not believe that the addition of those particular charges to a multicount indictment which already included more serious narcotics violations significantly increased the likelihood that Casey would jump bail. That Casey in fact remained available until after he had negotiated a plea bargain which specified the dismissal of the additional counts effectively refutes this theory. *See United States* v. *Hesse*, 576 F.2d 1110 (5th Cir. 1978).

Third, the sureties argue that they had no notice of the superceding indictment or of the court's order transferring bond from #359 to #551. Again, we cannot agree. The District Court found that the sureties had effective notice of the change by virtue of their attendance at the *Nebbia* hearing and their familiarity with the paperwork occasioned by their request to clip coupons. We uphold this finding of the District Court and note that the sureties' readiness to secure release from their bond at Casey's scheduled sentencing on the superceding indictment is hardly consistent with their present claim that their bond covered only the first indictment.

Finally, the surety defendants make a "material increase in risk" argument with reference to Casey's negotiation of a plea agreement. They contend that Casey's knowledge that he was facing a ten-year sentence increased the sureties' risk and

should therefore exonerate them from liability on the bond. Casey's plea bargain may or may not have "increased the risk;" in this context, however, the question is academic. The bond contract specifically indicates that the bond's effectiveness would continue *through appeal.* The sureties knew from the outset that Casey might negotiate a plea bargain and that some time might elapse between entry of his plea and sentencing. It is, as the government suggests, absurd for them to claim surprise at this turn of events. We emphasize that this is not a case where the principal defendant disappeared after sentencing; the line of cases which includes *United States* v. *D'Anna,* 487 F.2d 899 (6th Cir. 1973) is, as the District Court found, inapposite to the present controversy.

The judgment of the District Court is affirmed.